Supreme Court, U.S.
FILED

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No.

in the Supreme Court of the United States

OCTOBER TERM, 1993

ALBERTO A. ROSALES, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER

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22 pp

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit's new disentitlement rule pertaining to defendants who became fugitives while their cases were pending in the district court conflicts with this Court's decision in *Ortega-Rodriguez v. United States*, ___ U.S. ___, 113 S.Ct. 1199 (1993), and with similar rules set forth by other circuits.

2. Assuming the propriety of the Eleventh Circuit's disentitlement rule, whether its application in this case violated Petitioner's constitutional rights.

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BRIEF OF PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, which is subject of this Petition, has been published at 13 F.3d 1461 (11th Cir. 1994).

JURISDICTION

On February 10, 1994, the United States Court of Appeals for the Eleventh Circuit entered the judgment from which we seek review.

Jurisdiction is vested in this Court pursuant to the provisions of 28 U.S.C. 1254(1), and Supreme Court Rules 10.1(a) and 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment V, provides in pertinent part:

> No person shall — be deprived of life, liberty, or property, without due process of law.

The United States Constitution, Amendment XIV, provides in pertinent part:

> Section 1. — No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, Section 1291, provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone,

the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

Petitioner became a fugitive the day before closing arguments in a criminal trial that last more than three weeks. Petitioner was convicted on all counts in absentia, and he was sentenced approximately two years later after his recapture to a period of 85 years imprisonment. Although there were several co-defendants at trial, only two went to verdict and only Petitioner pursued an appeal.

After filing a timely Notice of Appeal, the Eleventh Circuit Court of Appeals dismissed the appeal on the ground that Petitioner had forfeited his right to appeal because he had become a fugitive during trial. *United States v. Rosales*, 978 F.2d 719 (11th Cir. 1992).

Petitioner filed his Petition For Writ of Certiorari to this Court, and this Court remanded the case back to the Eleventh Circuit Court of Appeals in light of its decision in *Ortega-Rodriguez v. United States*, ____U.S. ____, 113 S.Ct. 1199, 122 L.Ed.2d 581 (1993). *Rosales v. United States*, ____ U.S. ____, 113 S.Ct. 2406, 124 L.Ed.2d 631 (1993).

On remand, the appellate court has once again dismissed Petitioner's appeal, and in doing so, it has created a new disentitlement rule that violates this Court's decision in *Ortega-Rodriguez*, and it misapplies the facts of this case in violation of Petitioner's due process and equal protection rights.

Federal jurisdiction was conferred at the outset of this case because Petitioner was indicted in the United States

District Court for the Southern District of Florida, was tried and convicted in that court. Jurisdiction then vested in the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. Section 1291.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in this case because the rule promulgated by the Eleventh Circuit Court of Appeals in *United States v. Ortega-Rodriguez*, 13 F.3rd 1474 (11th Cir. 1994), does not comport with this Court's holding in *Ortega-Rodriguez v. United States*, ___ U.S. ___, 113 S.Ct. 1199, 122 L.Ed.2d 581 (1993). The Eleventh Circuit's new disentitlement rule, which broadly provides that a defendant's direct appeal will be dismissed if he becomes a fugitive at any time during the proceedings before the district court or appellate court unless the defendant satisfies a two part test, does not follow this Court's *Ortega-Rodriguez* decision, nor is it constitutional as applied. Moreover, the Eleventh Circuit rule conflicts with decisions in the Ninth Circuit and the District of Columbia Circuit.

ARGUMENT

I.

THE ELEVENTH CIRCUIT'S NEW DISENTITLEMENT RULE PERTAINING TO DEFENDANTS WHO BECAME FUGITIVES WHILE THEIR CASES WERE PENDING IN THE DISTRICT COURT CONFLICTS WITH THIS COURT'S DECISION IN *ORTEGA-RODRIGUEZ v. UNITED STATES*, ____ U.S. ____, 113 S.Ct. 1199 (1993), AND WITH SIMILAR RULES SET FORTH BY OTHER CIRCUITS.

Petitioner contends that the decision in *United States v. Ortega-Rodriguez*, 13 F.3rd 1474 (11th Cir. 1994), is erroneous because it conflicts with this Court's holding in *Ortega-Rodriguez v. United States*, ____ U.S. ____, 113 S.Ct. 1199, 122 L.Ed.2d 581 (1993). The Eleventh Circuit dismissed Ortega-Rodriguez's appeal without hearing the merits because he had become a fugitive after trial but prior to sentencing. In reaching this conclusion, the Eleventh Circuit further extended its decision in *United States v. Holmes*, 680 F.2d 1372 (11th Cir. 1982), by concluding that a defendant who fled after conviction but before sentencing waived his right to an appeal by engaging in conduct that was detrimental to the "legal system".

This Court viewed the controversy differently and held as follows:

> Accordingly, we conclude that while dismissal of an appeal pending while the defendant is a fugitive may serve substantial interests, the same interests do not support a rule of dismissal for all appeals filed by former fugitives, returned to custody before invocation of the appellate system.

> Absent some connection between a defendant's fugitive status and his appeal, as provided when a defendant is at large during "the ongoing appellate process," [citation omitted], the justifications advanced for dismissal of fugitives' pending appeals generally will not apply.
>
> We did not ignore the possibility that some action by a defendant, though they occur while his case is before the district court, might have an impact on the appellate process sufficient to warrant an appellate sanction . . . *In the class of appeals premised on insufficiency of the evidence, however, in which petitioner's appeal falls, retrial is not permitted in the event of reversal, and this type of prejudice to the Government will* not *serve as a rationale for dismissal.* [Emphasis Added]

Ortega-Rodriguez v. United States, 113 S.Ct. at 1208.

The Eleventh Circuit took *Ortega-Rodriguez* on remand[1] and fashioned the following rule:

> We hold that this Court should dismiss a former fugitive's appeal *unless the defendant can show* that: (1) granting the appeal is not likely to result in an undue burden on the government and; (2) the defendant's flight has not resulted in nor will not result in significant interference with the operation of the judicial process *in either the district court or the appellate court.*

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[1]Incredibly, the Eleventh Circuit, upon dealing with the *Ortega-Rodriguez* appeal on its merits, reversed the defendant's conviction because of insufficiency of the evidence. Were it not for this Court's decision, at least one defendant would be serving an extended jail sentence due to a conviction based upon insufficient evidence.

United States v. Ortega-Rodriguez, 13 F.3d 1474, 1476 (11th Cir. 1994).

On the same day it rendered its decision in *United States v. Ortega-Rodriguez, supra*, the Eleventh Circuit decided Petitioner's case, *United States v. Rosales*, 13 F.3d 1461 (11th Cir. 1994), which had also been remanded from this Court to the Eleventh Circuit after our previously filed petition for writ of certiorari was granted. *Rosales v. United States*, ____ U.S. ____, 113 S.Ct. 2406, 124 L.Ed.2d 631 (1993).

Petitioner contends that the Eleventh Circuit's new disentitlement rule as enunciated in *United States v. Ortega-Rodriguez*, 13 F.3d 1474 (11th Cir. 1994), and applied in that case and *United States v. Rosales*, 13 F.3d 1461 (11th Cir. 1994), is inconsistent with this Court's holding in *Ortega-Rodriguez v. United States, supra*. The essence of this Court's ruling was that appeals would be dismissed only in the rarest of circumstances. *Id.* at 1208. The Eleventh Circuit's rule presumes that any defendant who becomes a fugitive for any period of time, irrespective of whether the case rests with the district court or the court of appeals, must have his appeal dismissed unless the defendant can persuade the appellate court that the government will not suffer any undue burden, *and* that the defendant's flight will not result in significant interference with the operation of the judicial process in *either the district court or the appellate court*. *United States v. Ortega-Rodriguez*, 13 F.3d at 1476.

There are two aspects of the Eleventh Circuit rule which are objectionable. First, there is a legal presumption that an appeal will be dismissed unless the defendant can satisfy both parts of the court's two-pronged test. Since appeals to the Court of Appeals from criminal convictions

are a matter of right,[2] it is unreasonable for the court to impose such a heavy legal burden on the defendant, *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *United States v. Anagnos*, 853 F.2d 1 (1st Cir. 1988), especially given the lengthy sentences prescribed by the Federal Sentencing Guidelines, including the death penalty in an expanded number of cases.

Additionally, the appellate court should not dismiss an appeal because the delay occasioned by the defendant's flight has significantly interfered with the operation of the district court. That portion of the Eleventh Circuit test contradicts an important element of this Court's holding in *Ortega-Rodriguez*. This Court stated:

> In short, when a defendant's flight and recapture occur before appeal, the defendant's former fugitive status may well lack the kind of connection to the appellate process that will justify an appellate sanction of dismissal. *In such cases, fugitivity while a case is pending before a district court, like other contempts of court, is best sanctioned by the district court itself.* [Emphasis Added]

Ortega-Rodriguez v. United States, 113 S.Ct. at 1209.

Therefore, the combination of both elements of the Eleventh Circuit test are clearly violative of this Court's holding in *Ortega-Rodriguez*. The Eleventh Circuit has engaged in semantical gadgetry to create a new rule that is

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[2]Petitioner recognizes that there is no *constitutional right* to an appeal from a criminal conviction, *Abney v. United States*, 431 U.S. 651, 656, 97 S.Ct. 2034, 2038, 52 L.Ed.2d 651 (1977), and that the automatic right to appeal a criminal conviction to the Court of Appeals is statutory. See, F.R.A.P. Rule 4(b).

essentially the same as the old rule that was disapproved by this Court.

At least two other circuits have declined to follow the Eleventh Circuit's new rule. In *United States v. Reese*, 993 F.2d 254, 256 (DC Cir. 1993), the District of Columbia Circuit made the following disentitlement rule in light of the Court's decision in *Ortega-Rodriguez, supra*:

> In *Ortega-Rodriguez* the Supreme Court contemplated that the Courts of Appeal would "develop [ ] generally applicable rules to cover specific, recurring situations." *Id.* n. 23.
>
> Accordingly, we hold that a defendant whose flight prevents consolidation of his appeal with that of a co-defendant is not entitled to a delayed appeal to this Court. By thwarting consolidation, such fugitivity inherently disrupts the appellate process. To reward the fugitive by granting his claim to a second helping of the court's limited resources would be perverse indeed. [citation omitted]

The Ninth Circuit appears to be handling these matters on a case by case basis. In *United States v. Sudthisa-Ard*, 17 F.3d 1205 (9th Cir. 1994), the defendant fled prior to sentencing and was a fugitive for 13 years before his capture and sentence. Meanwhile, his co-defendant, who was also convicted at trial, proceeded with a timely appeal, the conviction was reversed and remanded, and the U.S. Attorney's Office declined to reprosecute. The Ninth Circuit dismissed the defendant's appeal because his 13 year absence would severely prejudice the government's efforts at retrial, and the defendant's flight precluded the Ninth Circuit from

consolidating his appeal with that of his co-defendant, thereby imposing a burden on the appellate court.

However, in *United States v. Hearron*, ____ F.2d ____, U.S. App. Lexis 1576 (9th Cir. 1994), the defendant became a fugitive while on bond pending appeal twice. Nevertheless, the Ninth Circuit reinstated his appeal and reversed his conviction. In doing so, the court pointed out that the Supreme Court's decisions in *Molinaro v. New Jersey*, 396 U.S. 365, 90 S.Ct. 498, 24 L.Ed.2d 586 (1970), and *Estelle v. Dorrough*, 420 U.S. 534, 95 S.Ct. 1173, 43 L.Ed.2d 377 (1975), sanctioned the concept that an appellate court may invoke procedural rules to protect its jurisdiction and to insure the orderly and efficient use of its resources. *Id.* at 4. Of course, this Court ratified the *Molinaro* rule in its decision in *Ortega-Rodriguez v. United States*, 113 S.Ct. at 1209-1210. In reaching its decision in *Hearron*, the Ninth Circuit reasoned as follows:

> While we accept the necessity of this entitlement to prevent a current fugitive from taking improper tactical advantage of the court, we believe for two reasons that the disentitlement doctrine should be expanded *only with great caution*. First, jurisdictional schemes as well as the fixing of the penalties for escape ultimately belong within the province of the legislature, not the judiciary. Yet the disentitlement doctrine consists of a judicial refusal to exercise jurisdiction. *It is better that we defer to Congress on the issue of what effect an escape followed by return or recapture should have on further judicial proceedings.* Second, the disentitlement doctrine may well bar otherwise meritorious claims. *Society as well as the individual defendant has an interest in judicial review of convictions and*

sentences allegedly imposed in violation of the Constitution. [Emphasis Added]

United States v. Hearron, ____ F.2d at ____, U.S. App. Lexis at 4, citing *United States v. Katz*, 920 F.2d 610, 613 (9th Cir. 1990).[3]

For these reasons, the Court should take certiorari and fashion a consistent and constitutionally sound disentitlement rule that would recognize a defendant's right to direct appeal as guaranteed by Rule 4 of the Federal Rules of Appellate Procedure, which right would be forfeited by a defendant only in extraordinary circumstances.

II.

ASSUMING THE PROPRIETY OF THE ELEVENTH CIRCUIT'S DISENTITLEMENT RULE, ITS APPLICATION IN THIS CASE VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS

In deciding to dismiss Petitioner's appeal for the second time, the Eleventh Circuit ruled that Petitioner was unable to satisfy either part of the two-pronged test.

First, the appellate court concluded that the government would be unduly burdened if this case were sent back for a retrial, pointing out that the case agent, Arthur Cash, died during the pendency of the appellate

[3]The caution exhibited by the Ninth Circuit concerning the effect of dismissing a meritorious appeal was certainly borne out by the Eleventh Circuit's decision in *United States v. Ortega-Rodriguez*, 13 F.3d 1474 (11th Cir. 1994), insofar as the Eleventh Circuit had dismissed the appeal of a defendant whose conviction was based upon legally insufficient evidence.

process. The government even attached a copy of Agent Cash's death certificate, which we attach in Appendix A-1. However, Agent Cash died on August 25, 1987, only *four months* after Petitioner was found guilty at trial (the jury's verdict was taken on April 17, 1987). Thus, even if Petitioner had never become a fugitive, Petitioner's appeal would not have been decided four months after the jury's verdict, and the government would still be without Agent Cash's testimony through no fault of Petitioner.[4]

It should also be noted that of the five issues raised in Petitioner's brief to the Eleventh Circuit, three issues deal with sufficiency of the evidence.

Thus, if Petitioner was to succeed on his appeal, the most serious charges (continuing criminal enterprise and the two conspiracy counts), would be reversed outright. Even if convicted after retrial on all the remaining counts, Petitioner's maximum sentence would be 25 years rather than the 85 years be originally received.[5] Given Petitioner's age and the fact that his sentence was imposed under pre-guidelines law, the potential difference in sentence would mean that Petitioner could reasonably expect to be released from prison before he died.

Next, the appellate court contends that Petitioner's fugitiveness was directly responsible for the 4½ year delay

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[4]Of course, the government would not lose Agent Cash's testimony at a retrial, because the government would surely be able to introduce his testimony and that of any other unavailable witness under F.R.E. Rule 804(b)(1).

[5]The Eleventh Circuit did address the issue in Petitioner's appeal that Petitioner could not be sentenced consecutively on the CCE count (the sentence was 45 years), and the three conspiracy counts (the sentence was 5 years consecutive to each other and consecutive to the CCE count). As a result, Petitioner's net sentence was reduced to 70 years.

between conviction and the filing of the appellate brief.[6] If Petitioner had not fled, reasoned the Eleventh Circuit, his bond would not have been forfeited and the assets that were lost to the forfeiture would have been available to pay for the trial transcripts.

The appellate court's reasoning makes no sense. For example, would the appellate court have reached a different result if Petitioner had engaged in a narcotics transaction utilizing his home, the premises of his bakery and one of his automobiles? Under those circumstances, it is likely that all those assets would have been forfeited pursuant to 21 U.S.C. § 881, *et. seq.* Yet, Petitioner's appeal would not have been dismissed due to the delay caused by litigating his motion to be declared indigent for costs. There is no logical reason to penalize Petitioner for committing a transgression (becoming a fugitive), that is less serious than others (dealing in cocaine).

As a result, a defendant who is penalized for exercising his right to be declared indigent for costs in connection with the prosecution of his direct appeal is deprived of due process as guaranteed by the Fourteenth Amendment to the U. S. Constitution, *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), and of equal protection of the law. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814 (1963).[7]

---

[6]Petitioner spent almost one year litigating whether he should be declared indigent for purposes of appellate costs so as to secure the trial transcript to perfect his appeal. The government consistently opposed what is usually a routine motion before the United States magistrate and forced Petitioner's counsel to appeal the magistrate's determination to the district court and to the court of appeals. The government took another six months to file its answering brief.

[7]Despite judgments entered against the sureties by the district court due to Petitioner's flight, it should be noted that he lost his home because it was foreclosed by the bank for lack of payment; his cars were

(Footnote continued on next page)

Finally, the substantive appeal that has never been heard, if won by Petitioner, will require the Eleventh Circuit to reverse the major counts in the indictment for insufficiency. While it is possible that the case could be remanded for retrial on certain counts, the government would not be unfairly prejudiced because of the untimely death of its agent.[8]

(Footnote continued from previous page)
never seized because they were essentially worthless; and his bakery business was taken over by a lender. Since Petitioner was the sole wage earner in his household, his family would have lost the home, the cars and the business anyway assuming he had surrendered to prison in the normal course of events.

[8]See footnote 4, *supra*.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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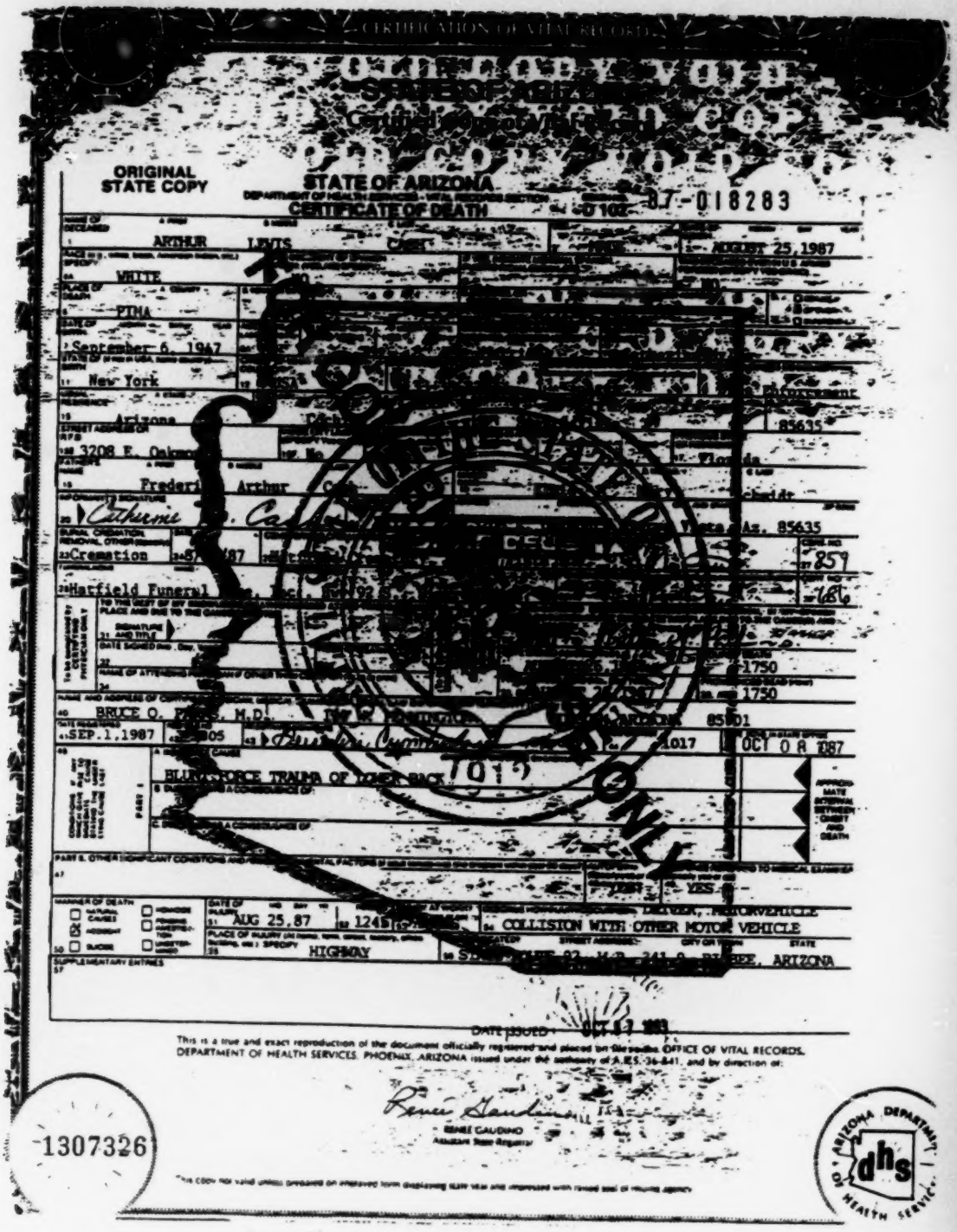
DATED: June 16, 1994

Appendix


CERTIFICATION OF VITAL RECORDS

ORIGINAL STATE COPY

STATE OF ARIZONA

CERTIFICATE OF DEATH

87-018283

ARTHUR LEWIS

AUGUST 25, 1987

WHITE

PIMA

September 6, 1947

New York

Arizona

3208 E. Quincy

85635

Frederi Arthur

Florida

Catherine B. Ca

Ariz. 85635

Cremation

Hatfield Funeral

1750

1750

BRUCE O. P[illegible], M.D.

SEP.1.1987

85701

1017

OCT 0 8 1987

BLUNT FORCE TRAUMA OF TORSO

AUG 25,87

1245

YES

COLLISION WITH OTHER MOTOR VEHICLE

HIGHWAY

[illegible] ARIZONA

DATE ISSUED: OCT 8 7 1987

This is a true and exact reproduction of the document officially registered and placed on file in the OFFICE OF VITAL RECORDS, DEPARTMENT OF HEALTH SERVICES, PHOENIX, ARIZONA issued under the authority of A.R.S. 36-841, and by direction of:

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ARIZONA DEPARTMENT OF HEALTH SERVICES dhs

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PETITIONER'S SUPPLEMENTAL APPENDIX

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8 pp

Supplemental Appendix
SA-1

United States Court of Appeals,
Eleventh Circuit.

Feb. 10, 1994.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Alberto A. ROSALES, Sr.,
Defendant-Appellant.

No. 89-5330.

Defendant convicted in absentia in the United States District Court, Southern District of Florida, No. 85-00382-CR-WJZ, William J. Zloch, J., appealed. The Court of Appeals, 978 F.2d 719, held that defendant had waived right to contest errors on appeal. Subsequently, the Supreme Court, 113 S.Ct. 2406, granted petition for writ of certiorari and vacated and remanded for further consideration. On remand, the Court of Appeals, Fay, Senior Circuit Judge, held that appeal by defendant, who became fugitive during trial and remained so for about one year, would be dismissed, as appeal would unduly burden government and had significantly interfered with judicial process.

Dismissed.

1. Criminal Law—1131(5)

Court of Appeals has discretion whether to grant former fugitive's appeal.

2. Criminal Law—1131(5)

Appeal by defendant who became fugitive during trial and remained so for about one year would be dismissed, as appeal would unduly burden government and had significantly interfered with judicial process; upon recapture, defendant had commenced lengthy collateral litigation in attempt to have government bear costs of trial transcript and his appeal, and none of collateral litigation would have taken place but for his flight, which had resulted in loss of security for bonds.

Appeal from the United States District Court for the Southern District of Florida.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES.

Before TJOFLAT, Chief Judge, BIRCH, Circuit Judge, and FAY, Senior Circuit Judge.

FAY, Senior Circuit Judge:

We consider this appeal on remand from the United States Supreme Court. *Rosales v. United States*, ____ U.S. ____, 113 S.Ct. 2406, 124 L.Ed.2d 631 (1993). The Supreme Court vacated our prior opinion[1] and instructed us to reconsider this case in light of *Ortega-Rodriguez v. United States*, ____ U.S. ____, 113 S.Ct. 1199, 122 L.Ed.2d 581 (1993). Because we find that granting Alberto A. Rosales,

---

[1]*See United States v. Rosales*, 978 F.2d 719 (11th Cir.1992) where we relied on *United States v. London*, 723 F.2d 1538 (11th Cir.), *cert. denied*, 467 U.S. 1228, 104 S.Ct. 2684, 81 L.Ed.2d 878 (1984), and held that because Rosales became a fugitive during trial, he waived the right to contest errors on appeal.

Sr. ("Rosales") an appeal would unduly burden the government and has significantly interfered with the judicial process, we DISMISS the appeal under the new law of this Circuit established by *United States v. Ortega-Rodriguez*, No. 91-5083-1, 1993 WL 60980 (11th Cir.1993).

I. FACTS

Rosales was arrested in May of 1985 and released on a $150,000 personal surety bond.[2] His trial began on March 23, 1987. On April 16, 1987, during trial, Rosales became a fugitive and the district court convicted him *in absentia*. On May 29, 1987, the district court ordered Rosales' bond forfeited and accordingly entered a $150,000 judgment against Rosales on August 3, 1987.[3]

The U.S. Marshal apprehended and arrested Rosales on November 26, 1988 for his flight from the Southern District of Florida. The district court sentenced Rosales on March 29, 1989, approximately one year after his flight. He appealed his sentence and conviction on April 4, 1989. On May 11, 1989, Rosales filed a motion[4] in the district court to be declared indigent for costs on appeal.

On June 13, 1989, this Court dismissed Rosales' appeal for want of prosecution and failure to file a docketing statement and make financial arrangements with the court reporter. One day later Rosales filed an

---

[2]The bond was secured by Rosales' two automobiles, equity in his home, stock in his bakery, and a $30,000 corporate surety bond.

[3]The judgment entered was to be satisfied by any and all of Rosales' real or personal property. Specifically, satisfaction was to come from Rosales' home, business, and the two cars. Foreclosure proceedings were completed on his home in June, 1988. On August 24, 1987 the court entered a separate order granting judgment against Rosales, Henry Acker, and Ace Bonding Company on the $30,000 corporate surety bond.

[4]The government opposed this motion.

Affidavit of Indigency in the district court. The affidavit stated that he had no cash anywhere and owned no real or personal property of any value. On June 15, Rosales filed a motion for reinstatement of his appeal. On June 20, 1989, the magistrate entered an order denying Rosales' motion to be declared indigent for costs. Rosales appealed that order to the district court.

On July 11, 1989 this court granted Rosales' motion to reinstate his appeal and to stay appellate proceedings until the district court ruled on Rosales' appeal regarding his desire to be declared indigent for costs. On August 21, 1989, the district court entered an order denying Rosales' motion seeking an indigent status. Rosales appealed that denial to this Court. We treated the appeal as a Motion for Leave to Proceed on Appeal *In Forma Pauperis* under *Fed.R.App.P.* 24(a), and granted Rosales his desired relief. Approximately four and one-half years after his conviction, Rosales filed his brief in this Court.

We issued an unpublished, *per curiam* opinion holding, under *London*,[5] that Rosales waived his right to contest claimed trial errors on appeal when he became a fugitive during trial. *United States v. Rosales*, 978 F.2d 719 (11th Cir.1992). Rosales petitioned for certiorari and the Supreme Court remanded the case for further consideration in light of its decision in *Ortega-Rodriguez v. United States*, ___ U.S. ___, 113 S.Ct. 1199, 122 L.Ed.2d 581 (1993).

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[5]*United States v. London*, 723 F.2d 1538, 1539 (11th Cir.), *cert. denied*, 467 U.S. 1228, 104 S.Ct. 2684, 81 L.Ed.2d 878 (1984) (holding that a defendant who becomes a fugitive during trial waives right to appeal).

II. DISCUSSION

[1] We have discretion in our review of whether or not we will grant a former fugitive's appeal. *Ortega-Rodriguez*, ___ U.S. at ___ n. 23, 113 S.Ct. at 1209 n. 23.

In *Ortega-Rodriguez*, the Supreme Court overruled *United States v. Holmes*, 680 F.2d 1372 (11th Cir.1982), *cert. denied*, 460 U.S. 1015, 103 S.Ct. 1259, 75 L.Ed.2d 486 (1983), and directed this Circuit to fashion a new rule to apply when considering whether or not a dismissal of a former fugitive's appeal is an appropriate sanction. *Ortega-Rodriguez*, ___ U.S. at ___, 113 S.Ct. at 1209.[6] We followed the Supreme Court's mandate and held that:

> this Court should dismiss a former fugitive's appeal unless the defendant can show that: (1) granting the appeal is not likely to result in an undue burden on the government and; (2) the defendant's flight has not resulted in nor will not result in significant interference with the operation of the judicial process in either the district court or the appellate court.

Ortega-Rodriguez, No. 91-5083-1, 1993 WL 60980 (11th Cir.1993).

[2] Here, Rosales was a fugitive for approximately a year. In addition, upon his recapture, he commenced lengthy collateral litigation[7] in an attempt to have the government bear the costs of the trial transcript and his

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[6]Although the Supreme Court did not expressly overrule *London* in *Ortega-Rodriguez*, the implication is that *London* no longer has any precedential value as it relied in large part on *Holmes*.

[7]In *Ortega Rodriguez*, we noted that one of the relevant factors to consider is "the extent of extraneous litigation that is causally connected to the defendant's flight." *Ortega-Rodriguez*, No. 91-5083-1 at 5.

appeal. The net result of the above activities was that Rosales filed his brief with this Court some four and one-half years following his conviction.

If we were to entertain his appeal and Rosales successfully argued for reversal on any of his arguments not involving sufficiency of the evidence, the government would be required to gather evidence and witnesses[8] from five years ago. Because there is a direct causal connection between Rosales' flight and the extreme delay in this case, we find that the government would be unduly burdened if we reach the merits of this case.

However, assuming *arguendo* that the burden on the government would not be too great, we will analyze the second prong of the *Ortega-Rodriguez* test. Our inquiry begins with Rosales' litigation regarding his indigency. As a threshold matter, it is necessary to point out the causal connection between his flight and his financial situation. Had Rosales never become a fugitive, he would not have lost his home, business and cars which served as part of the security for his two bonds totaling $180,000. If he had not lost these possessions, he would have been able to pay for his trial transcript and the costs of his appeal.

Instead, Rosales initiated collateral litigation in an attempt to be declared indigent. First he filed a motion in the district court to be declared indigent. Shortly thereafter, we dismissed Rosales' initial appeal challenging his conviction for want of prosecution and failure to make financial arrangements with the court reporter. The next day, Rosales filed an Affidavit of Indigency with the district

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[8]Special Agent Arthur L. Cash ("Cash") was an undercover DEA agent with knowledge of Rosales' criminal activity. Cash offered extensive testimony at trial regarding most of the charges against Rosales. Cash has since died in an automobile accident.

court followed by his motion in this Court to reinstate his appeal.

After the magistrate denied Rosales' motion to be declared indigent for costs, he appealed to the district court. Subsequently, we granted Rosales' motion to reinstate his appeal and stayed further appellate proceedings pending the district court's ruling on the appeal from the magistrate. The district court eventually denied his motion to be declared indigent for costs.

Unfortunately, this was not the end of the web of Rosales' attempt to be declared indigent. He appealed the district court's denial of his motion for costs to this Court. We treated his appeal as a motion under *Fed. R.App.P.* 24(a) for Leave to Proceed on Appeal *In Forma Pauperis*. We granted Rosales' motion and allowed him to proceed. Approximately a year after we entered our order on the Rule 24(a) motion, Rosales filed his brief with this Court.

But for Rosales' flight, none of the above collateral litigation would have taken place in either the district court or this Court. We need not address any prospective disruption of the judicial process because we find that Rosales' flight has already significantly interfered with the process in both our Court and the district court sufficient to warrant the sanction of dismissal. Because, under the facts of this case, Rosales failed to satisfy both prongs of the *Ortega-Rodriguez* test, we DISMISS his appeal.

III. CONCLUSION

For the above reasons, the defendant's appeal is DISMISSED.

(3)

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No. 94-162

In the Supreme Court of the United States

OCTOBER TERM, 1994

ALBERTO A. ROSALES, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals' dismissal of a former fugitive's appeal was consistent with the standards set out in this Court's decision in *Ortega-Rodriguez* v. *United States*, 113 S. Ct. 1199 (1993).

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OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (Pet. Supp. App. 1-7) is reported at 13 F.3d 1461. The prior opinion of the court of appeals is unpublished, but the decision is noted at 978 F.2d 719 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1994. On May 12, 1994, Justice Kennedy granted an extension of time, to and including June 17, 1994, within which to file a petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848 (Count 1); two counts of conspiracy to import marijuana, in violation of 21 U.S.C. 963 (Counts 2, 4); one count of conspiracy to possess various controlled substances with intent to distribute them, in violation of 21 U.S.C. 846 (Count 6); two counts of importation and attempted importation of marijuana, in violation of 21 U.S.C. 952(a) (Counts 3, 5); and three counts of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 7, 9, and 11). Gov't C.A. Br. 2.

Petitioner was sentenced to 45 years' imprisonment on the CCE count and to consecutive terms of five years' imprisonment on each of the eight remaining counts, for a total of 85 years' imprisonment. The court of appeals vacated petitioner's convictions and sentences on Counts 2, 4, and 6, and affirmed in all other respects. Petitioner filed a petition for a writ of certiorari, and this Court granted the petition and remanded the case (113 S. Ct. 2406 (1993)) to the court of appeals for further consideration in light of *Ortega-Rodriguez* v. *United States*, 113 S. Ct. 1199 (1993). On remand, the court of appeals dismissed petitioner's appeal. Pet. Supp. App. 1-7.

1. The evidence presented at trial is recounted in the government's initial brief in the court of appeals. Gov't C.A. Br. 4-25. Petitioner was the head of a drug ring that trafficked in heroin, cocaine, and marijuana from January 1982 to May 1985. In 1982, federal agents seized in transit several shipments of marijuana that members of petitioner's ring had attempted to smuggle into the United States from Jamaica and Colombia. In 1984, one

of petitioner's partners, David Quiles, quit the ring and began cooperating with the Drug Enforcement Agency (DEA). At the direction of DEA agents, Quiles arranged to purchase from petitioner and others one kilogram of heroin for $280,000, and in May 1985, these negotiations culminated in the delivery of the heroin.

2. Petitioner was arrested at the time of the heroin delivery and released on a $150,000 personal surety bond.[1] On March 23, 1987, petitioner's trial commenced. Thereafter, on April 16, 1987—the fourteenth day of trial—petitioner became a fugitive. Pet. Supp. App. 3. The district court proceeded with the trial in petitioner's absence and, on April 17, 1987, the jury found petitioner guilty on all counts. The district court ordered petitioner's bond forfeited and in August 1987 entered a $150,000 judgment against him.[2] *Ibid.*

On November 26, 1988, petitioner was apprehended after spending more than 19 months as a fugitive. In March 1989, the district court sentenced petitioner.[3] In April 1989, petitioner appealed his conviction and sentence and thereafter filed a motion in the district

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[1] The bond was secured by equity in petitioner's home, stock in his bakery, two automobiles, and a $30,000 corporate surety bond. Pet. Supp. App. 3 n.2.

[2] The district court's judgment "was to be satisfied by any and all of [petitioner's] real or personal property," Pet. Supp. App. 3 n.3, including his home, business, and two cars. In June 1988, foreclosure proceedings were completed on the home. Judgment was also entered against petitioner and the bonding company on the corporate surety bond. *Ibid.*

[3] The court of appeals' opinion erroneously states that petitioner was sentenced "approximately one year after his flight." Pet. Supp. App. 3. Reference to the specific dates involved shows that the sentencing in March 1989 occurred approximately two years after his April 1987 flight.

court to be declared indigent in order to have the government bear the costs of the trial transcript and his appeal. On June 13, 1989, the court of appeals dismissed petitioner's appeal for want of prosecution and for failure to file a docketing statement and to make financial arrangements with the court reporter. The next day, petitioner filed an affidavit of indigence with the district court in which he stated that he had no cash and owned no real or personal property of any value. Petitioner then filed a motion for reinstatement of his appeal. Pet. Supp. App. 3-4.

On June 20, 1989, the magistrate entered an order denying petitioner's motion to be declared indigent, and petitioner appealed that order to the district court. Thereafter, the court of appeals granted petitioner's motion to reinstate his appeal and stayed appellate proceedings until the district court ruled on petitioner's request for indigent status. On August 21, 1989, the district court denied petitioner's motion to be declared indigent, and petitioner appealed that order to the court of appeals. Treating the appeal as a motion for leave to proceed on appeal *in forma pauperis* under Fed. R. App. P. 24(a), the court of appeals granted petitioner his requested relief. Finally, approximately four and one-half years after his conviction, petitioner filed his brief in the court of appeals. Pet. Supp. App. 4.

3. The court of appeals held that petitioner had waived his right to challenge putative trial errors on appeal when he became a fugitive during trial. In so holding, the court relied on *United States* v. *London*, 723 F.2d 1538, cert. denied, 467 U.S. 1228 (1984), a case that established the Eleventh Circuit's rule that a defendant who

becomes a fugitive during trial waives his right to appeal. Pet. Supp. App. 4.[4]

This Court granted petitioner's petition for a writ of certiorari, and remanded the case (113 S. Ct. 2406 (1993)) for further consideration in light of its decision in *Ortega-Rodriguez* v. *United States*, *supra*. In *Ortega-Rodriguez*, the Court overturned the Eleventh Circuit's automatic dismissal rule, holding that "[a]bsent some connection between a defendant's fugitive status and his appeal," courts may not dismiss appeals filed by defendants who have been returned to custody before invoking their appellate rights. 113 S. Ct. at 1208. The Court indicated, however, that it was not holding "that a court of appeals is entirely without authority to dismiss an appeal because of fugitive status predating the appeal." *Ibid.*

4. On remand, the Eleventh Circuit again dismissed petitioner's appeal, relying on the rule it had fashioned on remand in *Ortega-Rodriguez*. That rule provides:

> [T]his Court should dismiss a former fugitive's appeal unless the defendant can show that: (1) granting the appeal is not likely to result in an undue burden on the government and; (2) the defendant's flight has not resulted in nor will not [*sic*] result in significant interference with the operation of the judicial process in either the district court or the appellate court.

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[4] The court of appeals did vacate petitioner's convictions on the three conspiracy counts—Counts 2, 4, and 6—on the grounds that those counts had merged with his conviction on the CCE count. Gov't Supp. C.A. Br. 5.

United States v. *Ortega-Rodriguez*, 13 F.3d 1474, 1476 (11th Cir. 1994); see Pet. Supp. App. 5. The court held that petitioner's case did not satisfy either requirement.

With respect to the burden on the government, the court of appeals noted that if petitioner were to prevail on any arguments other than a challenge to the sufficiency of the evidence, "the government would be required to gather evidence and witnesses from five years ago." Pet. Supp. App. 6 (footnote omitted).[5] Finding a direct causal connection between petitioner's flight and the extreme delay in this case, the court of appeals concluded that the government would be unduly burdened by permitting the appeal to proceed. *Ibid.*

The court of appeals further found that petitioner's flight, through the resulting forfeiture of his bond, had caused the lengthy collateral litigation involving petitioner's request to be declared indigent for costs on appeal.

> As a threshold matter, it is necessary to point out the causal connection between [petitioner's] flight and his financial situation. Had [petitioner] never become a fugitive, he would not have lost his home, business and cars which served as part of the security for his two bonds totaling $180,000. If he had not lost these possessions, he would have been able to pay for his trial transcript and the costs of his appeal.

Pet. Supp. App. 6. Based on that fact, the court of appeals concluded that petitioner's flight had "already signifi-

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[5] In assessing the burden on the government, the court of appeals focused strictly on the five-year delay caused by petitioner's flight. Pet. Supp. App. 6. In fact, however, by the date of the court of appeals' opinion, nearly seven years had elapsed since petitioner's conviction.

cantly interfered with the [judicial] process in both our Court and the district court sufficient to warrant the sanction of dismissal." *Id.* at 7. Because petitioner did not establish the prerequisites for maintaining his appeal, the court dismissed petitioner's appeal. *Ibid.*

ARGUMENT

1. Petitioner contends that the Eleventh Circuit's rule governing the dismissal of appeals by former fugitives is inconsistent with the standards set forth by this Court in *Ortega-Rodriguez*. That contention is without merit.

In *Ortega-Rodriguez*, the Court held that the courts of appeals may not automatically dismiss all appeals filed by former fugitives who have been returned to custody before invoking the appellate process. 113 S. Ct. at 1208-1209. The Court made clear, however, that the courts of appeals may exercise discretionary authority to dismiss such appeals when there is "some connection between a defendant's fugitive status and his appeal," so that dismissal is a reasonable response. *Id.* at 1208. Dismissal is inappropriate only when a defendant's "former fugitive status in no way affects the appellate process." *Id.* at 1209 n.23.

Contrary to petitioner's claim, the test applied by the court of appeals in this case fully comports with the holding in *Ortega-Rodriguez*. The first prong of the court's test inquires whether granting the appeal is "likely to result in an undue burden on the government." Pet. Supp. App. 5. That is an appropriate consideration. *Ortega-Rodriguez* expressly recognized that a long escape that prejudiced the government "in locating witnesses and presenting evidence at retrial" might "make dismissal an appropriate response." 113 S. Ct. at

1208.[6] In this case, the court found such an undue burden because, in the event of retrial, the prosecution would be required to gather evidence and witnesses from 1987, due to the five-year delay occasioned strictly by petitioner's flight. Pet. Supp. App. 6.[7]

Petitioner further argues (Pet. 7-8) that the Eleventh Circuit's test governing dismissals is flawed in that it allows consideration of significant interference with the operation of the judicial process "in either the district court or the appellate court." Pet. Supp. App. 5. According to petitioner, only appellate court operation can be considered under this Court's holding in *Ortega-Rodriguez*. Although under *Ortega-Rodriguez* a defendant's flight must have an impact on the "appellate process" to be properly considered in the dismissal determination, 113 S. Ct. at 1209, that "appellate process" may involve both the district court and the

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[6] We recognize that the burden on the government would be an inappropriate consideration if an appeal were premised solely on a challenge to the sufficiency of the evidence, since no retrial could be had if petitioner prevailed. *Ortega-Rodriguez*, 113 S. Ct. at 1208. In this case, however, although petitioner did raise sufficiency of the evidence claims with respect to certain counts, he also raised other claims of error which, if successful, would have necessitated a retrial. Moreover, as we discuss below, the court of appeals also relied on the fact that petitioner's flight interfered with the appellate process as an independent basis for dismissal.

[7] Petitioner suggests that the court's finding of a burden was erroneous because one prosecution witness specifically identified in the opinion below died in 1987, and thus would not have been available even in the event of a prompt retrial. Pet. 11-12. The court of appeals' conclusion that the government would be unduly burdened on retrial, however, was based on a general assessment of the difficulties in "gather[ing] evidence and witnesses" after the passage of so much time, not just on the loss of one witness's testimony. Pet. Supp. App. 6.

appellate court. In this case, for example, the extensive collateral litigation concerning petitioner's request to be declared indigent for purposes of appeal took place after petitioner filed his notice of appeal and delayed and complicated the appeal. The collateral proceedings were therefore connected to the "appellate process," although they were conducted in both the district court and the court of appeals. See Pet. Supp. App. 3-4.

Accordingly, the Eleventh Circuit's finding that petitioner's flight had "already significantly interfered with the [judicial] process in both our Court and the district court sufficient to warrant the sanction of dismissal," Pet. Supp. App. 7, is an appropriate consideration under *Ortega-Rodriguez*. There is no indication that the Eleventh Circuit would apply its current test in a manner that conflicts with this Court's decision in *Ortega-Rodriguez*, *i.e.*, that it would allow dismissal of an appeal based solely on the fact that a defendant's flight had interfered with the pre-appeal judicial process in the district court.

2. There is no merit to petitioner's further contention (Pet. 9-11) that the decision below conflicts with decisions of the District of Columbia Circuit and the Ninth Circuit. This Court in *Ortega-Rodriguez* specifically held that the circuits need not adopt a uniform approach to the dismissal of appeals brought by former fugitives. 113 S. Ct. at 1209 n.24. Rather, "so long as all circuit rules meet the threshold reasonableness requirement, in that they mandate dismissal only when fugitivity has some connection to the appellate process, they may vary considerably in their operation." *Ibid.*

In any event, the cases petitioner cites reveal no conflict among the circuits. In *United States* v. *Reese*, 993 F.2d 254, 256 (D.C. Cir. 1993), and *United States* v. *Sudthisa-Ard*, 17 F.3d 1205, 1207 (9th Cir. 1994), the

courts of appeals dismissed the appeals of former fugitives on the ground that presentencing flight interfered with the appellate process by preventing consolidation of a defendant's appeal with that of his co-defendant. In neither *Reese* nor *Sudthisa-Ard*, however, did the court of appeals suggest that prevention of consolidation was the *only* appropriate basis for a finding of interference with the appellate process; accordingly, neither the District of Columbia Circuit nor the Ninth Circuit has "declined to follow the Eleventh Circuit's new rule," as petitioner claims. Pet. 9.[8]

3. Petitioner's final claim (Pet. 12-13) is that it was improper for the court of appeals to consider the delay caused by the litigation of his motion to be declared indigent for costs on appeal in assessing whether petitioner's flight had interfered with the appellate

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[8] Petitioner also relies on the Ninth Circuit's unpublished memorandum decision in *United States* v. *Hearron*, No. 86-1232 (Jan. 18, 1994), although Ninth Circuit Rule 36-3 provides that such dispositions are not precedential and should not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. Moreover, *Hearron* is distinguishable because it involved a defendant who absconded while his appeal was pending and was subsequently recaptured. See *Ortega-Rodriguez*, 113 S. Ct. at 1205 (cases involving fugitives during appeal present different considerations than fugitives returned to custody before appeal). Relying on its prior opinion in *Katz* v. *United States*, 920 F.2d 610 (1990), the Ninth Circuit decided to reinstate Hearron's appeal, which was clearly meritorious in light of the court's earlier reversal of his co-defendant's conviction. In *Sudthisa-Ard*, however, decided after *Hearron*, the Ninth Circuit emphasized that "*Katz* permits, but does not require, review of a recaptured defendant's appeal." 17 F.3d at 1208. Accordingly, there is no conflict between the Ninth Circuit's practice and the Eleventh Circuit's rule.

process.[9] He asserts that he might have lost his property by means other than bond forfeiture, such as through asset forfeiture had he engaged in cocaine trafficking on the premises. Since selling cocaine would not result in dismissal of his appeal, petitioner reasons that the sanction of dismissal should not attach to the less serious offense of becoming a fugitive. Petitioner's claim is foreclosed by the Court's recognition in *Ortega-Rodriguez* that appellate courts may dismiss appeals of defendants whose flight is deemed a significant interference with the appellate process, 113 S. Ct. at 1208-1209, even though the commission of other presumably more serious crimes would not result in that sanction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney

NOVEMBER 1994

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[9] Although petitioner suggests that his claimed indigence was not in fact caused by his flight (Pet. 13 n.7), he does not appear to be seeking review of the court of appeals' contrary finding. In any event, that factual determination does not warrant review by this Court.